No. 87-1659

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

FARMERS & MERCHANTS BANK,

Petitioner,

v.

SARAH FORMBY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT SARAH FORMBY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether review of the Court of Appeals' decision by writ of certiorari is appropriate given the fact that the trial court's charge to the jury accurately stated the law and eliminated the issues raised by the question urged by the Bank in its Petition?

2. Whether petition for certiorari to the Supreme Court of the United States is the appropriate vehicle to review for the fourth time the facts which make up this case?

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TABLE OF AUTHORITIES

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CASES:

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) 4

United States v. Johnson, 268 U.S. 220, 45 S.Ct. 496 (1925) 6

STATEMENT OF THE CASE

Respondent Sarah Formby cannot accept Petitioners' Statement of the Case because of omissions and misstatements that are significant to this Petition. Respondent (hereinafter referred to as Ms. Formby) is 61 years of age and worked for the Petitioner Bank from September, 1974 until December 14, 1984. (App. D. pg. 35).*

Ms. Formby was employed as a teller in the main branch of the Bank and a drive-in teller waiting on customers, receiving deposits, cashing checks and accepting loan payments. (App. D. pgs. 35-36). She worked in the branch when the manager was absent or on vacation and was acting branch manager, balancing the vault and seeing that the drawers were balanced, etc. (App. D. pg. 36).

The overwhelming consensus of the evidence reflected that Ms. Formby was a highly capable and competent employee. (App. D. pgs. 18-19, Concession by attorney for Petitioner Bank; App. D. pgs. 21, 28, 33, 36).

In December, 1984, Ms. Formby was terminated and was advised that there were other younger persons who were being terminated at the same time. However, within one (1) week the other employees were returned to employment with the Bank. (App. D. pgs. 41-42; 79-80). Although she requested on at least a couple of occasions to return to work with the Bank, her requests were refused (App. D. pg. 79).

Finally, Petitioner's Statement of the Case recounts testimony offered by its primary witness (Bank Petition

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*All references to the transcript are to Bank's Petition and the Appendices attached thereto.

pg. 7). The Bank's statement reflects testimony offered by Mr. Rutledge. However the countertestimony that was presented by Ms. Formby effectively stated that at the time she approached Mr. Rutledge about being re-employed with the Bank, she approached Mr. Rutledge in a manner that was not angry and merely asked for a job. (App. D. pg. 99).

SUMMARY OF THE ARGUMENT

The petition for writ of certiorari should be denied because (1) the petition is in reality a request that the Court again review the facts of the case; (2) the trial court's charge to the jury accurately stated the law and removed from consideration the issues raised by the Petitioner.

ARGUMENT

Many Issues Presented in the Petition Were Resolved by the Trial Court's Charge

The trial court's charge to the jury properly stated the law and clearly covered the concerns addressed in the Petitioner's questions numbered 1, 3, 4 and 5 (Brief of Petitioner, pg. 1).

In his charge, the Honorable U. W. Clemon, District Judge, told the jury the following:

> The plaintiff was not a union employee, and since there was no seniority system, the fact that she was

> employed as a teller longer than some other employees, does not in and of itself, prove age discrimination.
>
> • • •
>
> The law does not require that advanced age and substantial length of service entitle employees to special favorable consideration, and it does not require that an employer adopt a policy that will maximize the number of older employees in its work force.

(App. D. pg. 126).

The aforementioned portion of the charge to the jury, to which there was no exception by either party, clearly addresses, to the benefit of the Petitioner, the issues raised in question 1 (is priority accorded to the recall of persons within the protected age group under the ADEA); question 3 (is an employee in the protected age group entitled to more favorable treatment than other employees because of seniority); question 4 (does an employer have a duty to accord an employee within the protected age group more favorable treatment over other employees not in the protected age group when making employment decisions); question 5 (is an employer required to bump employees not within the protected age group under the ADEA in favor of employees within the protected age group or with less seniority).

Clearly, the petitioner is simply attempting to raise issues that might excite the Court. However, a review of the proceedings below and the charge of the Court as set out herein squarely addresses these issues and it is sub-

mitted should eliminate them from a consideration in the petition.

Petitioner's argument that the trial court and the Eleventh Circuit failed to follow the procedure of proof established by *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), is without basis. (Bank Petition pg. 17). The trial court in its charge clearly delineated the standard required of Ms. Formby:

> In order to win on her claim, the plaintiff must prove each of the following things by a proponderance of the evidence: Number 1, that she was within the protected age group; that is she was between age forty and age seventy; Number 2, that she was discharged from the Diane branch by the defendant bank and that she was not transferred or recalled to a similar position at another location of the bank; Number 3, that she was qualified to work in a similar position at another location of the bank; and finally, Number 4, that her age was one of the determining factors that caused the defendant not to transfer or recall her to a similar position at another location of the bank. Plaintiff must prove that the defendant intended to discriminate against her because of her age.
>
> Defendant denies that it discharged the plaintiff or failed to transfer or recall her because of her age. It says that she was discharged because the Diane Branch where she worked was closed for legitimate business reasons. It says the plaintiff was not rehired, because she never made a formal application for reemployment, and that her informal inquiry to the president and Chief Executive Officer was not in good faith, as the plaintiff rudely and unpleasantly accosted him, knowing that her actions would insure that she would not be rehired.
>
> * * *

> Defendant as an employer is entitled to make its own subjective business judgments regarding the selection of employees for termination, so long as it does not discriminate on the basis of age. You, the jury, may not substitute your judgment for that of the defendant in this matter, even though you personally may not approve of the defendant's exercise of its judgment and you personally would have acted differently.

(App. D. pgs. 125-126).

Based upon the foregoing it is clear that the trial court's charge to the jury established the appropriate legal standards by which the jury was to assess the evidence.

Certiorari is Not a Vehicle to Review—for a Fourth Time—the Facts of a Case

Initially, the jury considered the facts on the basis of appropriate instructions from the trial court. Further, the jury was able to consider the demeanor of the witnesses, the credibility of the testimony and apply their judgment to the law as provided to them by the court. After a verdict, adverse to the Bank, Petitioner filed a motion for Entry of Judgment Notwithstanding the Verdict or Alternatively, for a Remittur or a New Trial. (Bank Petition App. G). After consideration of the same, the trial judge overruled the said motion. (Bank Petition App. G).

The Eleventh Circuit, with a panel consisting of Chief Judge Roney, Circuit Judge Tjoflat and the Honorable M.M. Paul, United States District Judge for the Northern District of Florida, sitting by designation, unanimously affirmed the verdict of the jury and upheld Judge

Clemon's view of the facts and denial of the Bank's petition. Furthermore, the same panel unanimously denied the Bank's petition for rehearing and/or rehearing in banc. (Bank's Pet. App. B-C). The Petitioner calls on this Court to make a fourth review of the trial record to determine if it can find something two previous courts unanimously agreed did not exist—error. Further, this petition is not a vehicle for a re-review of the facts: "We do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227, 45 S.Ct. 496, 497 (1925). In the present case, Petitioner raises only questions turning entirely on facts in this case, already resolved three times in favor of Respondent and without any impact outside the elements of this case. Certiorari for this reason should be denied.

Finally, the Petitioner attempts to raise questions again for the fourth time regarding the sufficiency of the charge filed by the Respondent with the Equal Employment Opportunity Commission. Under the facts in this case, which again have previously been addressed by the district court and the Eleventh Circuit, it has been determined that the charge was appropriate to encompass the failure to recall issue. As a review of the statement of the case submitted herein will reveal, the Respondent did not file her charge with the EEOC until after the two younger employees had been recalled to work (approximately one (1) week after they had all been ostensibly terminated). Furthermore, in her charge of discrimination, Respondent alleges that she was replaced by a younger female. Under the factual scenario of the case, the only individuals who could have replaced the Respondent were those individuals discussed by Mr. Rutledge in his testimony that is, those

two ladies who were recalled shortly after their termination.[1] Once again, the Petitioner is merely asking the Court to review the factual setting of this case. It is submitted that this effort should be denied.

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CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[1]The issue regarding the Respondent's charge of discrimination with the EEOC is also a factual dispute. The wording of the charge and the timing of the charge clearly reflect that the Respondent filed the charge after the other younger employees were recalled and Respondent's charge even references a claim that she was replaced by a female less than 50 years of age. (See Bank Pet. App. H). The facts as established at the time of the filing of the charge clearly put the Bank on Notice of the recall claim in as much as the Respondent had charged that the Bank had recalled younger employees in Paragraph Numbered IIIc of the EEOC charge.